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IN THE

Supreme Court of the United States

October Term, 1949.

No. 156.

THE UNITED STATES,

Petitioner,

v.

COMMODITIES TRADING CORPORATION, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1949.

THE UNITED STATES, *Petitioner,* v. COMMODITIES TRADING CORPORATION, *et al.,* *Respondents.*	No. 156

Brief of Respondents in Opposition to Petition for Writ of Certiorari to Court of Claims.

Respondents, Commodities Trading Corporation, *et al.,* oppose the petition of the Solicitor-General for a Writ of Certiorari to review the judgment of the Court of Claims.

Petitioner, the United States, does not state correctly the question presented. That question is actually two-fold and is:

FIRST: Whether, in a suit for just compensation by the owner of Whole Black Pepper requisitioned by the United States for War uses in May 1944 (which pepper was not perishable [Fdg. 25, R. 22] and could have been easily and cheaply stored and held until the end of price control [Fdgs. 21 and 24, R. 19-20, 21-22]), the O. P. A.'s ceiling price of 6½¢ must be considered as the sole measure of value, regardless of the fact that the O. P. A. Price Regulations themselves afforded many opportunities for selling far above that 6½¢ price in May 1944.

Instances of such opportunities are as follows:

(1) By mixing ground pepper with cheap neutral agents, three parts neutrals to one part of pepper, and selling the whole as imitation or synthetic pepper, which was permitted and for which there was an O. P. A. established ceiling price of 16¢ per pound in 1944, and thereby obtaining 25¢ to 40¢ per pound for the pepper (Fdg. 18, R. 18-19).

(2) By selling to foreign countries, especially South America, at the O. P. A. restricted price, but much higher than the United States ceiling price (export licenses required) (Tr. 9-11, 80-81, 120).

(3) By selling to Porto Rico, Hawaii and Alaska at O. P. A. prices much higher than the continental United States ceiling price (no licenses required) (Fdg. 20, R. 19).

All of the above matters are fully discussed and the Regulations analyzed at pages 7-9 and 14-17, *infra*.

This is just the opposite of the situation in the *Felin* case where the owner had to sell and could not sell above the ceiling price. Here the owner did not have to sell at all but could have sold far above ceiling of 6½¢ if he had wished to sell at such prices.

SECONDLY: Whether said ceiling price would be the proper measure of just compensation, when said ceiling price bore no relation to value at the time of seizure, by reason of all of the following facts and when all holders refused to sell (Fdg. 19, R. 19):

(a) A dearth of pepper throughout the whole world and market price thirty times the O. P. A. ceiling, where no price control (Tr. 17, 95).

(b) Certainty of shortage of pepper and correspondingly high price by 1944, if there had been no War, due to causes which had taken place prior to the War, which still existed at the beginning of the War, and which could not have been remedied in less than approximately seven years, which shortage was increased by but not caused by the war (Fdg. 26, R. 22, Tr. 99-100, 135, 160).

(c) In May 1944, ceiling price had become arbitrary, unreasonable and unrealistic and was maintained against advice of entire spice trade (Fdg. 16, R. 18, Tr. 48-51) and within five months after requisition here in question, O. P. A. was forced to increase price to 10¢, a 50% increase, and later to 16¢, approximately two and one-half times the ceiling price at time of seizure (Fdgs. 19, R. 19).

(d) No market in the United States in May 1944 and no trading for many months prior thereto and subsequent thereto, and none until said increase of 50% (Fdg. 19, R. 19), but active market in British India where 20,000,000 pounds allocated to the United States by Allied Food Board was available for purchase (Fdg. 23, R. 21), market price 21¢ per pound delivered in the United States and O. P. A. Regulations sole obstacle to supplying much needed pepper in United States (Fdg. 23, R. 21).

(e) Ceiling price less than half of average cost of pepper requisitioned, and of all of owners' 17,000,000 pounds (Tr. 123-124).

(f) Continuance of ceiling price in May 1944, which had prevented all dealings for many months (Fdg. 19, R. 19), and when Commodities Trading Corporation held 60% of all Whole Black Pepper in hands of importers (Fdg. 14, R. 18), and when remainder was in hands of a few others was direct

effort of O. P. A. to force sales of this pepper before permitting importation of Indian pepper (Fdg. 23, R. 21, Tr. 55-56).

Petitioner's statement of the question presented further deviates from that actually presented by the record as follows:

The ceiling price "when established" did not approximate "free market value". On the contrary, it was a depressed market price resulting from the dumping on New York of the holdings of war-frightened Sumatrans, plus the unauthorized attacks and restrictions upon the holders and purchasers of pepper by Mr. Leon Henderson, first head of O. P. A. (Tr. 162, 113, 117-118).

Nor did such ceiling price "form the basis for substantial trading". On the contrary, those who sold were the small holders who were scared out of their holdings soon after ceiling prices were established (Fdg. 11, R. 16-17). No trading for many months before and after May 26th, 1944 (Fdg. 19, R. 19).

Nor did the retention value allowed respondents take into account "scarcity value caused by wartime shortages". Had it done so, the allowance to respondents would have had to have been upwards of 50¢ per pound (Fdg. 17, R. 18), instead of the 15¢ allowed by the Court of Claims, and the 22¢ asked in the Complaint.

Nor was an "expectation of an ultimate removal of wartime price restrictions" on May 26th, 1944, a "speculation". It was a practical certainty and highly probable in the near future. By that time the Allies were winning all along the line.

Statement.

Petitioner produced only one witness upon the trial of this case before the Court of Claims and he did not contradict in any way any of the evidence introduced by Respondents (Tr. 146-173).

The Court of Claims made many of its findings along the lines requested by these Respondents, but in some cases watered down the evidence considerably. That Court also made several findings requested by Petitioner herein, which were not supported by any evidence. However, the facts actually found, support the allowance of 15¢ per pound made by the Court of Claims and indeed a substantially greater allowance. This Respondent has petitioned this Court for a Writ of Certiorari to review the failure of the Court below to allow 22¢ per pound. Such petition is No. 163 on the October 1949 term of this Court and states the facts at some length.

Petitioner, picking and choosing its facts, gives a very different picture of the situation from that as seen by these Respondents.

Thus, in an effort to make it appear that there was a plentiful supply of pepper at the beginning of the War and that the ceiling price of 6½¢, which was half of the average over many years and ¼th of the average from 1915 to 1930 (Fdg. 9, R. 16), was a fair one, Petitioner says (p. 4 of Brief):

> "• • • there were about 78,000,000 to 100,000,000 pounds (about three years' supply) of Whole Black Pepper in the hands of importers in the United States (R. 15)."

That statement is supported by the findings, but Petitioner omits to state that said quantity was practically all the pepper that there was in the world at that time (Tr. 17) and was less than one year's supply for the world (Tr. 69).

Again, Petitioner refers to Respondent, Commodities, herein, as a speculator in pepper (p. 13), and says that of the stock pile of 78,000,000 pounds above referred to, approximately 17,000,000 was owned by Commodities (p. 4), giving the impression that Commodities was a War

speculator. This is directly contrary to the fact. Commodities was a corporation which was *sui generis*. It was composed of four friends who set out in 1934 to accumulate a minimum of 15,000,000 pounds of pepper (which substance is not attacked by insects, remains unimpaired for decades, and is easily and cheaply stored), and to hold the same for the next peak of prices, which was bound to come (Tr. 30-37, Fdg. 25, R. 22). This accumulation continued to 1939, when their corporation, Commodities Trading Corporation, had built up an inventory in the United States of upwards of 25,000,000 pounds of whole black pepper (Fdg. 5, R. 14).

When the War clouds appeared, Commodities, instead of buying, sold, to an aggregate of about 8,000,000 pounds, reducing its inventory to 17,000,000 pounds (Fdg. 8, R. 15, Tr. 33).

The Court of Claims found that the pepper seized by the Army, and the subject of this litigation, had been held by Commodities for an average of nine years and four months at the time of seizure (Fdg. 24, R. 21). All of the 17,000,000 pounds had been held for about that time on an average.

At page 7 Petitioner indicates that there was some selling of pepper after September 30th, 1943 at the 6½¢ price. This is not correct, there was none, the Court of Claims found:

> "19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October." * * *
>
> "15. * * * Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders * * *."

The ceiling price in question was one for importers and traders. The grinders sold ground pepper at a higher price (O. P. A. Reg. 52).

As early as October 1943 the army offered to pay Commodities Trading Corporation 9¾¢ for 1,000,000 pounds and later requisitioned (Fdg. 22, R. 20).

Moreover, it was during this period that there was being sold in large quantities imitation or synthetic pepper—only one-fourth real pepper—at O. P. A. ceiling of 16 cents per pound (Fdg. 18, R. 18).

See also testimony of brokers and dealers and head of spice division of O. P. A. that pepper could not be bought (Tr. 47, 90, 91, 156).

Petitioner at pages 7 and 8 refers to a letter of the Price Administrator and states the contents as facts. This letter was shown by Petitioner's own witness, head of O. P. A. spice section, to have been an outrageous attempt to prejudice Commodities Trading Corporation. The Court of Claims refused to find any of the facts stated therein and found that some element of plaintiff's costs aggregated $.127 in the face of the statement in said letter that its cost was only 5.156 cents per pound. For fuller discussion see Point 7, *infra*, on the cost of the pepper.

This letter was released at the time that the government sought unsuccessfully to requisition all of Commodities Trading Company's pepper principally for civilian use.

Respondent does not assign error to the findings of cost by the Court of Claims, and the statements of the letter seem to have no proper place in the statement of facts.

At page 9 Respondent says:

> "Fifty percent of the award was thereafter paid to them (R. 15) and on October 3, 1945 this suit for just compensation was filed with the Court of Claims (R. 1-4)."

This is slightly misleading. No payment whatever was made to Commodities Trading Company until weeks after this suit was brought and eighteen months after the requisition (Fdg. 7, R. 14, 15).

Because of the full discussion of the facts in these Respondents' own petition and because the facts are rather numerous and can be best and most succinctly stated in connection with the particular points to which they apply, respectively, Respondents will merely make a brief statement of the salient facts.

There was a complete change in the situation between December 1941, when pepper dumped in huge quantities by the War frightened Sumatrans upon the New York market (Tr. 162, 113) was selling at 6.75¢ per pound, at which time the O. P. A. fixed a ceiling price at that figure, and the situation in May 1944. At the latter date, the 100,000,000 pounds in the hands of importers in the United States, when War was declared, had been reduced to 28,000,000—less than a year's supply for continental United States (Fdg. 14, R. 18, Fdg. 8, R. 15, Tr. 69).

There was a worldwide shortage of black pepper (Tr. 17). It was selling for as much as $2.00 per pound in countries where there was no ceiling price (Tr. 95, 56). But the O. P. A. had kept the ceiling price at 6½¢ for two years and three months. This, in spite of enforced reductions in use by quotas down to 40% of normal. The ceiling price did not prevent holders of Whole Black Pepper from selling lawfully in May 1944 at much higher prices than 6½¢ (Fdg. 13, R. 17-18).

Instances of this ability to sell at prices higher than ceiling are as follows:

(a) the sale of a concoction called imitation or synthetic pepper, consisting of ¼th pepper and ¾th cheap adulterants, with an O. P. A. ceiling price of 16¢ per pound (Fdg. 18, R. 18-19).

(b) sales to Porto Rico, Hawaii and Alaska (Tr. 154).

(c) sales to South America (Tr. 9-11, 80-81, 120).

In addition all of the following evidence, bearing upon value and just compensation, showed that an allowance in excess of 6½¢ and in excess of 15¢ was required: Market prices, up to $2.00 per pound in South America and other conutries where no ceilings were imposed (Tr. 95, 56); an active market in India at 21¢ per pound, where exports were limited to England, the United States, and other countries approved by them, where up to 20,000,000 pounds could have been purchased delivered in New York for 21¢ freight and insurance paid except for prevention by O. P. A. (Fdg. 23, R. 21); a price of 60¢ as soon as the ceiling was removed; opinion evidence by experts that, had there been no War, the price in May 1944 would have been at least 20¢ due to peculiar conditions which existed in 1942, and which would have taken seven years to remedy, in the absence of War (Fdg. 9, R. 15, Fdg. 26, R. 22-23; Tr. 99 and 100, 65), and many other factors, showing actual value, besides an actual cost of 14.59¢ per pound (Tr. 123-124).

Plaintiff sought no War profits and limited its claim to an amount which it could have obtained, had there been no War.

The opinion of the Court of Claims accepts this Respondent's contentions as to most of the facts and as to the Rules of Law applicable, but the judgment grants only approximately two-thirds of the minimum which should have been allowed upon the theories accepted by the Court of Claims.

The decision was clearly a compromise one and so stated by the Court of Claims.

Petitioner's Specification of Errors.

In the Specification of Errors numbered (4), error is claimed with respect to a *holding* of the Court that was never made or approached in its Findings or Judgment.

The quoted portions of said Specification are taken from two different paragraphs of the *Opinion* not in sequence.

If the Court of Claims had held as stated by Petitioner, the judgment for plaintiff would have had to have been on the basis of 60¢ per pound of pepper requisitioned, instead of the 15¢ which was actually awarded, as Whole Black Pepper was selling at that price immediately after the ceiling was removed (Spec. Fdg. 17, R. 18; Tr. 96-97) rising to 80¢ (Tr. 40) and now to $1.00.

FIRST POINT.

The facts in the case at bar are just the opposite of those which impelled some of the justices of this court to suggest in the Felin case that the ceiling price was the measure of value and of just compensation in that case.

In the *Felin* case (*United States* v. *Felin*, 334 U. S. 624), perishable property, owned by a dealer in that class of property, was requisitioned. The majority of the Court seemed to be against accepting the ceiling price as the measure of value and of just compensation, even in that case. However three of the Justices did make that suggestion.

The basis of their opinion was that, viewed realistically, the *Felin Company* had to sell and that as it could not sell for more than the ceiling price, its said perishable property was worth *to it* no more than that price and it was damaged by the taking no more than that amount.

The emphasis was put directly on the fact that the property was perishable and had to be sold, and that the

dealer would have to continue to sell or go out of business. That is just the exact opposite of the situation here presented.

Respondents' pepper is not perishable, but can be stored for many years without deterioration (Fdg. 25, R. 22). It is not a substance which was essential for the defense of the United States or for the well-being of civilians (Deft.'s Ex. 5 and Stipulation of Facts, Tr. 206-207, 220). It is used in only minute quantities—only ¼ of a pound per person per annum (Tr. 26). There was no freeze order or program price fixed with respect to Whole Black Pepper and the only regulations and restrictions imposed consisted of O. P. A. Reg. 52 which fixed a general ceiling price, first 6½¢, then 10¢ and then 16¢ with certain exceptions (Fdg. 19, R. 19) and the imposition of quotas upon packers and grinders. Those quotas were first 100%, then 90, then 60, then 40 of prewar volume of business (Fdg. 13, R. 17-18).

Not only was there no compulsion, either legal or practical, which required Respondents, or their predecessor, Commodities Trading Corporation, to sell to anyone in May 1944, and it could have held its pepper until the end of Government Regulation, but it did not wish to sell at that time, and it was not faced with "economic hibernation" or "economic extinction" by any means. The situation as to this matter is well explained in the opinion of the Court of Claims, as follows:

> "This so-called 'retention value' is particularly applicable in this case. Plaintiff, Commodities Trading Corporation, was not a trader in pepper; it was rather an investor in pepper. It began buying pepper in 1933, and by Pearl Harbor Day in 1941 it had accumulated a stock of 21,000,000 pounds. It was accumulating this stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it" (R. 25).

Plaintiff, Commodities Trading Company, had no customers. It belonged to no spice associations, but held aloof from spice dealers. Its inventory was never considered as a part of the stocks of pepper for sale (Tr. 217-19).

The fundamental distinction between the case at bar and the case of *United States* v. *Felin*, 334 U. S. 624, is well stated in the opinion of the Court of Claims as follows:

> "Mr. Justice Reed, who wrote the concurring opinion in which the view was taken that the ceiling price was the measure of just compensation, made it plain in his opinion that they were dealing in that case with perishable property. In the following quotation from his opinion we have underscored his use of the word 'perishable':
>
> 'It would be anomalous to hold that Congress can constitutionally require persons in the position of the respondent to sell their *perishable* property to the general public at a fixed price or not to sell to anyone and later to hold that the Government must pay a higher price than the general public where it requisitions the *perishable* property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction. The two situations are so parallel that the constitutionally established maximum price may, under the circumstances here, be properly taken as the measure of "just compensation." That lawfully fixed market price deter-

> mines what the *perishable* article can be sold for or its market value in any real sense. It gives to the condemnee any profit for increased value in his hands and takes nothing from him that he could lawfully obtain since consequential damages for loss of good will cannot be obtained. Such maximum price is "just compensation" " (pp. 645-6). (Italics, those of Court of Claims.)

Thus, the whole basis of the suggested effect to be given to the ceiling price in the *Felin* case was the fact that the property requisitioned was perishable and the owner thereof was a dealer in that kind of property, neither of which conditions applied to Commodities Trading Corporation or its property.

The Court of Claims after quoting as above from Mr. Justice Reed's opinion continues:

> "Even if the ceiling price is the measure of just compensation for perishable property, we do not think it can be said to be the measure where nonperishable property is requisitioned. This is so because the owner of nonperishable property has the right to hold it until after restrictions are removed, and then sell it. He is not required to sell at the ceiling price, whereas the owner of perishable property must sell at the ceiling price or let his property perish.
>
> We have several times held that, in determining just compensation, we must take into account the plaintiff's right to hold its property until restrictions on its disposition are removed. *Seven-Up Bottling Co.* v. *United States*, 107 C. Cls. 402; *Kaiser* v. *United States*, 108 C. Cls. 47; *Adler Metal Products Co.* v. *United States*, 108 C. Cls. 102; *Pantex Pressing Machine Co.* v. *United States*, 108 C. Cls. 735" (R. 24 and 25).

SECOND POINT.

The regulations of O. P. A. themselves afforded to plaintiff, Commodities Trading Corporation, many opportunities to sell its pepper at prices far in excess of the 6½¢ general ceiling price. This fact constitutes another direct distinction between the case at bar and the Felin case.

The foundation of the argument set forth in the quotation from the Opinion of Mr. Justice Reed in the *Felin* case was not only that *Felin* had to sell, but that he could not obtain more than the particular ceiling price in question for his perishable property.

In the case at bar, plaintiffs proved numerous opportunities afforded by the O. P. A. Regulations themselves which permitted the owners of Whole Black Pepper to sell at prices far in excess of the said general 6½¢ price. These instances were as follows:

Use of its pepper for the making of synthetic or imitation pepper and the selling of same at an O. P. A. ceiling price to return from 25 to 30¢ a pound for the pepper (Fdg. 18, R. 18-19).

On this point the Court of Claims found:

> "18. During the years 1943 and 1944 which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent.
>
> "This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound * * *."

The cost of grinding Whole Black Pepper was only a fraction of a cent per pound (Tr. 156).

This Court can take judicial notice that parched corn, wheat and cotton seed hulls are cheap ingredients. Thus, one thousand pounds of ground pepper mixed with three thousand pounds of these cheap adulterants could be sold in bulk at an O. P. A. ceiling price of $640.00. If only half of this is attributed to Whole Black Pepper, 32¢ would be realized for each pound thereof.

Other instances where the O. P. A. Regulations themselves gave to Commodities Trading Corporation and other dealers in its class, opportunities to sell at prices far in excess of the 6½¢ ceiling price were as follows:

Whole Black Pepper in hands of bulk dealers, in which class was Commodities Trading Corporation (see F. D. O. 19), could be sold in quantities less than one bag (150 lbs.), free from restriction of said ceiling price (see Regulation 52 of O. P. A.)

The said F. D. O. 19 put restrictions and limitations upon sales and established quotas, and plaintiffs understand that the War Food Administration contended that bulk dealers were subject to those restrictions, even though they are applied specifically to packers and grinders and other receivers of pepper.

However, said F. D. O. 19 provides as follows:

> "Any person may, without charge to his quota, deliver or accept for delivery any restricted spice to any of the following persons: * * * the Army, Navy, Marine Corps, Coast Guard, War Shipping Administration, the American National Red Cross or the United Service Organizations, Inc., any person operating an ocean going vessel, any person for retail sale through concession restaurants at the Army, Navy, Marine Corps or Coast Guard Camps and others."

The cost of those sales would have been negligible (see testimony of Government's Witness, Squires, Head of Spice Division of O. P. A., Tr. 156).

A further opportunity to sell for prices far in excess of the said ceiling price was furnished by the Regulations of O. P. A. with respect to sales to Porto Rico, Hawaii and Alaska (Fdg. 20, R. 19). An entirely different method of measuring ceiling price in sales of that kind was provided from sales in Continental United States. The ceiling price was either 10% above the O. P. A. ceiling price in Continental United States, plus 125% of the prewar percentage markup or cost plus a percentage (O. P. A. Price Reg. 52, Tr. 154).

As plaintiff, Commodities, had paid much more than 6½¢ for some of its pepper, and as its mark ups on foreign sales had been substantial, the above rules gave it an opportunity to sell at prices more than double the ceiling price, and plaintiff did in fact sell substantial quantities of pepper to Porto Rico for 14.19¢ per pound (Fdg. 20, R. 19; Tr. 120, 123).

While these sales were made in 1945 and after the ceiling price had been increased to 10¢ per pound, the same opportunity to sell at the same price existed in May 1944, as those sales were made on the basis of cost plus allowance of export profit.

A still further opportunity to plaintiff, Commodities, and others to sell for prices far in excess of said 6½¢ ceiling price was furnished by the O. P. A. Regulations with respect to sales to foreign countries. These were substantially the same as the sales to Porto Rico, Hawaii and Alaska, but in this case the opportunity to sell was not unrestricted as in the case of those sections of the United States, but export licenses were required. However our Good Neighbor Policy required the United States to share its dwindling supply of pepper with South America, and export licenses were issued to many holders of Whole

lack Pepper, including Commodities, which was allowed fill orders from Argentina for 35,000 pounds at the uivalent of 21¢ a pound* (Tr. 120-123).

Thus, it is seen that the whole foundation for the opinn of Mr. Justices Reed, Black and Murphy in the *Felin* se is entirely lacking in the present case, as there were any opportunities for plaintiff, Commodities, to sell far excess of the ceiling price. Therefore the value of its pper to it was much more than 6½¢ and it suffered a ss of much more than 6½¢ through the taking thereof the Army.

THIRD POINT.

There was no market in black pepper in the United tates in May 1944 and none had been sold for many onths prior thereto and none was sold until October of at year and until after the ceiling price had been inreased to 10 cents. These facts distinguish the case at ar from several of the cases cited by petitioner and furher distinguish it from the Felin case.

The Court of Claims found:

> "15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Com-

*The actual price obtained for this pepper was 30.93c to 32.31c per pound r white pepper, but black pepper may be transformed into white pepper by e removal of the outer shell and at a total cost, including such loss, of 1/3 Tr. 120-121).

modities, disposed of their holdings, and replenishment of their stocks had become impractical because of war conditions" (R. 18).

"19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October" (R. 19).

The Solicitor-General, at page 7 of his brief says:

"Between September 30, 1943 and the date of requisition, May 26, 1944, very little Whole Black Pepper was sold out of these inventories (R. 18) (the 28,000,000 lbs. still in the hands of importers on September 30, 1943) and Commodities itself apparently refused to sell any substantial amount either to the Government or to private purchasers."

This is no contradiction of plaintiff's proof, that there was no market whatever and no sales during any part of 1944 prior to October (Fdg. 19, R. 19).

However, the statement itself has no support. There was no proof that Commodities itself had sold a pound subsequent to September 30, 1943 and the proof is that it did not and could not have sold any substantial amount from the beginning of the War to May 26, 1944. It started with an inventory of approximately 17,000,000 pounds at the beginning of the War (Fdg. 8, R. 15). The Army requisitioned a million pounds in December 1943, and Commodities had on hand at the time of the requisition here in question on May 26, 1944, 16,153,000 pounds (Tr. 122).

Moreover, early in October 1943, the Army offered to purchase said million pounds from Commodities for 9¾

cents. In March 1944, the Government sought to requisition practically all of the pepper of Commodities and other importers (Tr. 206-208). The only justification for either of the above actions was an inability to purchase at the ceiling price.

Moreover, when plaintiff, Commodities, brought an injunction suit to prevent said requisitioning of its pepper, the Department of Agriculture, through its officials Long and Olmstead, put in affidavits showing the absolute impossibility of purchasing any pepper for many months prior to March 1943 for either Army or civilian use, and went into this matter in considerable detail. These affidavits were offered by plaintiffs and excluded by the Commissioner, but were marked for identification and form part of Section "K" of the Stipulation of Facts, and appear at pages 208 to 214 of the Transcript.

Two of the largest dealers in pepper in the United States testified flatly that there was absolutely no market and no sales (Tr. 47, 90 and 91).

Indeed, the scarcity of pepper was so great that, as above shown in the Second Point, the concoction called imitation or synthetic pepper, which contained only one-fourth or less actual pepper, was sold in large quantities at high prices with O. P. A. assistance. With respect to this matter, the Court of Claims found as above shown:

> "18. During the years 1943 and 1944, which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remiander being ground parched corn, wheat, cotton seed hulls, or other neutral agents.
>
> "This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on

whole black pepper was 6.5 cents a pound" (R. 18-19).

No one would have bought this stuff if there was any real pepper obtainable at 6½¢.

At page 14 of its brief, the Solicitor General refers to the maximum price of 6½¢ cents as one validly established in time of War and forming the basis for substantial trading.

Respondents submit that this statement is not justified, as shown conclusively previously in this point. There was no substantial trading, nor any trading of any kind for many months prior to the requisition in question. The trading that did take place occurred shortly after the establishment of the ceiling price, and was due largely to sales by small holders discouraged by the ceiling price (Fdg. 11; R. 16), and perhaps by the hostile attitude which Mr. Leon Henderson had taken toward them (Tr. 164, 165). The Court of Claims further found that "upon the establishment of price ceilings, the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942, as importers, other than Commodities, disposed of their holdings, and replenishment of their stock had become impracticable because of War conditions" (Fdg. 15; R. 18). The middle of 1942 was only approximately three months from the time when the ceiling price of 6½¢ was first put into effect, and only about five months from the initial fixation of a ceiling price.

The fact that there might have been and were heavy sales in 1942 has importance only as showing a market at the ceiling price, but proof of a market in 1942 is no proof of a market in May 1944, especially in the face of the direct testimony that there had been no sales in 1944 prior to October, and that all selling had dried up long previous to 1944.

Respondents have stressed, and perhaps over-stressed, this point, but their excuse is that in most of the cases where a ceiling or program price has been held the measure of just compensation, the Court found that such ceiling or program price was the market price, and that there were substantial sales currently.

It would be hard to imagine a case where the proof of no market and no sales could be stronger than the case at bar.

This situation is in strong contrast to that which existed in *Felin* v. *United States,* 334 U. S. 624; *Cudahy Bros. Co.* v. *United States,* 155 F. (2) 905; *Vogelstein & Co.* v. *U. S.,* 262 U. S. 337; *Louisville Flying Service, Inc.* v. *U. S.,* 64 F. Supp. 938; *Lessner Plumbing and Heating Co.* v. *U. S.,* 64 F. Supp. 931 and *Graves* v. *U. S.,* 62 Fed. Supp. 231, cited by petitioner.

In all of the above cases, there was clear proof that there was a market and actual selling. Thus, in the *Felin* case, the prevailing opinion states (p. 638):

> "• • • throughout the period in controversy it (respondent Felin & Co.), continued to buy live hogs at prevailing prices and to sell pork products derived from them at the authorized ceiling prices, even when this meant selling its pork products below the price that the Court of Claims found to be their replacement cost value."

The Court supported that statement with a footnote setting out a finding of the Court of Claims as follows:

> "Throughout the period mentioned (prior to and after the March 1943 requisition) plaintiff continued to buy live hogs at prevailing prices and to sell pork products derived from them at the ceiling prices authorized by Regulations of the Office of Price Ad-

ministration, even when the cost of live hogs was greater than the wholesale prices of the products obtained from them" (67 Fed. Supp. 1022) (p. 638, Note 13).

Thus, it appears that for reasons of its own the plaintiff was, at the time of the requisition or thereabouts, making sales of similar property to that requisitioned at ceiling prices. Therefore, regardless of plaintiff's motives in making such sales, there was a market at the ceiling price, which fact alone completely differentiates the *Felin* case from the case at bar.

In the *Vogelstein* case (262 U. S. 337) it was held that just compensation for copper taken by the Government during the First World War is to be measured by the market value of the copper at the time of the taking and not by higher prices which the owner was obliged to pay under long time purchase contracts.

The case is not in point for the reason that the facts showed that there *was a market price* for the copper at the time of the taking, which price was paid by the Government.

This Court found that the contention of the appellant that there was no market price other than that fixed by the *fiat* of the United States was without support, saying of the market price found by the court below:

"The price so found uniformly prevailed during the period in question" (p. 340).

The case is therefore not in point.

In the *Cudahy* case (155 F. [2] 905), another meat case, the Court found that at the time of the taking of the carcasses there was an established market at Cudahy, Wisconsin, at which the owner was selling like carcasses at the ceiling price. That fact alone, of course, completely differentiates the case from the case at bar.

In the *Lessner* case (64 F. Supp. 931), copper and copper base alloy products were requisitioned. These were brass pipes used by owner in making installations of plumbing in houses. There was no market or possible use for the products as brass piping because of governmental use restrictions. However, the copper recovery program set forth prices at which idle and excess inventories of copper and copper alloy materials might be sold.

The Court found:

> "The market value of plaintiff's holdings at the price established under the Copper Recovery Program was $262.21." (p. 934)

and gave judgment on that basis.

Under Maximum Price Regulation No. 12 of O. P. A., the ceiling price would have restricted plaintiff to about one-half of the above recovery.

In support of the above quoted finding, the District Court found that:

> "Plaintiff's holdings of brass pipe consisted of eight different sizes and chemical compositions. In some cases it held only one twelve foot length of a given size of pipe and its total inventory gave the appearance of being remainders left over from various installations which it had made. In no case did plaintiff hold enough of any single size and composition of pipe to enable it to be used for a complete job" (Fdg. No. 21).
>
> "The permitted users of copper base alloy products were only interested in buying substantial quantities and did not consider plaintiff's holding a marketable quantity" (Fdg. No. 22).
>
> "Almost 15,000 holders of idle and excess inventories of copper and copper base alloy products

sold their holdings voluntarily to Copper Recovery Corporation (a government agency) at the prices established under the Copper Recovery Program. The aggregate weight of these holdings exceeded 105,000,000 tons" (Fdg. No. 23).

"Over 13,000,000 pounds of copper and copper base alloy piping and tubing were sold voluntarily to Copper Recovery Corporation at the prices established under the Copper Recovery Program" (Fdg. No. 24).

The amount involved in the entire controversy was only a few hundred dollars. The material consisted of odds and ends and the facts above recited seem to establish that there was a market price as found by the Court.

Of course, it is well established that where there is a market price that is all that an owner can recover for property requisitioned.

Graves v. *United States*, 62 Fed. Supp. 231, was another District Court case dealing with the Copper Recovery Program.

The property requisitioned was certain metal handles for blow torches. Because of the scarcity of copper, the Government prohibited the making of such material or the sale of it. The property was saleable during the War only as scrap.

There was no proof introduced to show that the property would have a use or value after the War or what that use or value might be. This case, like the *Lessner* case, involved only a small amount of money and apparently no attempt was made to assert the principle of "retention value".

There was an O. P. A. ceiling price of 10¼¢ per pound for copper base alloy scrap, whereas under the Copper Recovery Program, the Government offered 19.93¢ per pound.

Many persons, as shown more fully in the *Lessner* case, availed themselves of this opportunity to sell to the Government for nearly twice the O. P. A. ceiling price.

The Court found (Fdg. 13):

> "The fair market value of the requisitioned castings on the date of the taking was the Copper Recovery Program price of 19.93 cents per pound."

and judgment for that amount was given. There were sufficient facts from which the Court might reasonably have found market price at the figure stated. Having found market value as above stated, the Court properly found that plaintiffs were entitled to recover no more than such market value.

In *Louisville Flying Service, Inc.* v. *United States* (*supra*), the District Court allowed what was manifestly a most fair amount for the plaintiff's airplanes. The amount involved was relatively small and no appeal was taken. There was clearly a market price, which price was allowed the plaintiffs.

Five thousand four hundred and thirty-four planes were acquired by the Government from private owners shortly after the outbreak of War. These planes were all acquired according to a formula which started with the list price of the plane on October 1, 1941 and depreciated it according to certain rules. Of all the planes acquired, the two planes of plaintiff were the only ones where the Government formula price was rejected. Even plaintiff accepted the formula as fair and it appeared that it declined to sell voluntarily only because of tax reasons.

Moreover, nineteen planes of the same model as the two planes of the *Louisville Flying Service* were acquired at the same program price by voluntary transfer. On the above facts, the Court held that there was a market price and said:

> "But, if there is an existing established market value, even though the owner declines to sell at it, it becomes a yardstick in determining what the Government must pay if it decides to take the property through condemnation proceedings" (p. 942).

Doubtless the planes in question, due to the War emergency, could have been sold for much more than the Government Program Price, if the Government had not prohibited the sale of any such planes during the War emergency. On the other hand the proof clearly indicates that plaintiffs received as much and more than they could possibly have shown as "retention value", though no claim therefor was made.

FOURTH POINT.

Plaintiff, Commodities, could reasonably have realized in May 1944 far more than 6½¢ for its pepper, if no war had intervened, and plaintiff lost much more than 6½¢ per pound by the taking of its pepper. To restrict just compensation to 6½¢ in such circumstances would be a travesty upon justice.

In the prevailing opinion in the *Felin* case, *supra,* this Court says:

> "Just compensation is a practical conception—a matter of fact, and not of fiction" (p. 641).

and further

> "In enforcing this Constitutional requirement, (the just compensation required by the Fifth Amendment), the question is 'What has the owner lost, not what has the taker gained?' (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *McGovern*

> v. *New York*, 229 U. S. 363). Respondent's sole claim is for the pecuniary equivalent of the property taken" (p. 630).

The above is precisely what these respondents claim. Respondents' predecessor, Commodities Trading Company lost 759,750 pounds of its inventory of Whole Black Pepper (Fdg 3, R. 13). What must respondents be paid to put them in as good a position pecuniarily as they would have been in if the property had not been taken?

Whether respondents are entitled to the higher prices due to the permanent destruction of pepper plantations by neglect or by the Japanese after the invasion of Sumatra may be debatable, but that would require an allowance of from 50¢ to a dollar a pound. Respondents are claiming only 22¢ per pound, which is no more than the pepper requisitioned would have been worth in May 1944, had there been no War.

The graph found by the Court of Claims in its ninth finding shows that for 75 years the price of pepper moved in cycles and that those cycles were fairly regular in that the length of time between the several tops and the several bottoms was always about 15 years—the life of the pepper plant (Findings 9 and 26, R. 16, 22-23). The evidence showed that pepper prices had moved in these cycles for over 100 years (Tr. 37).

The reason for the cycles was shown in Finding 26 as follows:

> "The plant does not bear any fruit for the first four years, during which constant cultivation is required, but then has a bearing period of from ten to fifteen years with an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines.

"The 1926 Lampong crop was the smallest in history, with the result that prices reached the highest levels ever recorded; this greatly stimulated planting, leading to a period of very low prices some five years later. This in turn reduced plantings. The consequent reduction in crop was first noticeable, so far as its effect on prices was concerned, in 1937, 1938, and 1939, and by 1941 had had sufficient effect in raising prices so that new plantings might have been made in 1942.

"If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (Fdg. 26, R. 22, 23).

The proof was much stronger than the findings and respondents, in their petition for certiorari, have assigned as errors the failure of the Court to find in accordance with the evidence (Assignment of errors 17 to 18).

The statement in the finding above, that it was probable that production of pepper in Sumatra would have decreased each year after 1941 until about 1945 or 1946 is a great understatement. Humanly speaking, it was inevitable. The pepper vine does not produce at all until four years after planting and does not get into real production until seven years thereafter (Tr. 160). It continues to bear only seven years (Tr. 134, 135). So in 1941 all of the pepper vines which had been planted 14 or 15 years previously were dying of natural causes, and each year vines which had been planted in later years would die (Tr. 135). Continued new plantings were always required to maintain a supply of pepper (Tr. 135, 136). There were no new plantings up to the time of the

Japanese occupation, going back as far as 1935 or 1936 (Tr. 140, 143-145). In addition, many pepper gardens had been neglected and had been swallowed by the jungle, a matter which can take place in the space of only a "couple of months" (Tr. 134). This production was gone.

Assuming new plantings in 1942, which the Court seems to do, but without foundation, a trickle from these plantings of pepper would begin to come in 1946 and increase thereafter, but not a pound of pepper would be produced in 1944, or in any year prior thereto, except from vines which had been in the ground for at least four years. On the other hand, most of the pepper vines which had been planted prior to 1930 and all of the heavy plantings of 1927, 1928 and 1929 would have ceased to bear (Fdg. 26, R. 22; Tr. 160, 134, 135).

The above is not a theory or a probability, but is a fact as definite as the multiplication table.

For a hundred years a falling off in production has always been attended by an increase in price (see graph, part of Fdg. No. 9), and the Court of Claims specifically found that such "decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (Fdg. 26, R. 23).

In the petition of these Respondents, No. 163, October Term, 1949, of this Court, they show that the increase in prices due to the decreased supply would have brought about a price substantially higher than the 15¢ allowed by the Court and substantially equal to the 22¢ demanded in the Complaint.

Respondents at this point, however, do not consider it necessary or proper to go into a detailed discussion of the exact increase in price over the market price of 6¾¢ per pound, which existed at the beginning of the War, as they submit that proof of any increase over that price is sufficient to destroy the argument of the Solicitor-General.

FIFTH POINT.

Respondents were not allowed "retention value" by the Court of Claims, but less than that part of "retention value" which represented what opinions of experts showed the market would have been if there had been no war and such allowance violates no rule of any of the cases cited by Petitioner.

The allowance to plaintiff was no more, and, indeed, less than the amount which it showed it could have received in May 1944 for its pepper, based solely on conditions which existed before the War and independently of War, or of approaching War, and which continued until the Japanese invasion of Sumatra in 1942, and which colud not have been corrected until seven years thereafter.

This case presents a most unusual situation and nothing like it could exist, except with respect to pepper or some commodity which took many years to produce. But the facts as shown in the preceding point are plain, and an allowance of the reasonable amount which plaintiff would have obtained, had there been no War, violates no principle of any case cited by the Petitioner.

Petitioner, at page 15 of his brief, concedes that the payment to respondents must be just and equitable and the many cases cited by him at that page do hold that a just and equitable payment is all that the Fifth Amendment prescribes, but it does prescribe that payment.

Is it just to pay respondents half of the cost of their pepper and less than one-third of what their pepper would have been worth, had there been no War, and less than one-tenth of what it could have sold its pepper for during the War if not restricted by Government controls because of a ceiling price which put a stop to all trading?

A ceiling price is fixed to prevent the holders of property taking advantage of War scarcities. There is no attempt at anything of that kind here.

At page 16 of its brief, the petitioner states that it is anomalous to require the Government to pay a higher price as just compensation tha nthe price at which property is sold to the general public, but that is not this situation. No pepper was being sold to the public at the price which the Government offered to pay.

The "bugbear" which petitioner suggests at page 17 of its brief, could never arise from any rule asked for by these respondents. No owner would ever refuse to sell at a ceiling price that was anywhere near fair and undergo the great expense of litigation if in the end all he could receive would be the value of his property at the time of taking based upon what it would have been worth had there been no War.

The numerous cases cited by petitioner at pages 17, 18 and 19 of its brief are so far from the facts of the case at bar that comparison is of little value. Those cases do, however, state in general terms the principles for which these respondents contend.

Thus, in *United States* v. *Petty Motor Company*, 327 U. S. 372, the Court said:

> "The Constitution and the Statutes do not define the meaning of 'just compensation', but it has come to be recognized that 'just compensation' is the value of the interest taken."

In *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, the Court said that

> "it was the owner's loss not the taker's gain which was the measure of compensation."

In *United States* v. *Miller*, 317 U. S. 369, the Court held that

> "Fair and substantial justice to the owner is the only basic measure of compensation prescribed by the Constitution."

It excluded from "just compensation" an increase in the value of real estate which had taken place since the authorization of the project for which the property had been taken.

The equivalent of this would take from these respondents the value caused by destruction and scarcity resulting from the War, but would leave to them the full value which would have obtained in 1944 from the failure to plant and the abandonment of pepper gardens which took place prior to the War.

The Court below did not compound any error and did not allow Respondents to get for their pepper whatever anyone is willing to pay at the end of the War, as stated by Petitioner (p. 21 of its brief). That would have required the allowance of a price of from 60 cents to a dollar.

Respondents cannot be classed as "recalcitrant owners" who wished to take advantage of wartime conditions, nor do they ask to be compensated for expected postwar profits, as stated by Petitioner (p. 22). What they do ask is that they be not deprived by the War of the profits that they would have obtained otherwise.

The sales made to Porto Rico subsequent to the requisitioning, which are objected to by the Petitioner, were used by the Court of Claims to reduce the allowance which it made to Respondents.

SIXTH POINT.

While there was no market in the United States in 1944 prior to October, in which month the price was increased to 10¢, there was an active market in India, the next largest producer of black pepper to Sumatra, and there was no obstacle to importing up to 20,000,000 pounds of this pepper except the refusal of O. P. A. to allow the same. Said Indian market price was 21¢ delivered alongside and sustains an allowance of at least 22¢ a pound as just compensation to plaintiffs.

In respondents' Third Point it was shown that there was no market in black pepper in the United States in 1944, prior to October. But the Court of Claims found with respect to the Indian market as follows:

> "23. Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.
>
> "Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April ..18.55 to	19.00	September	16.90
May	20.00	October	19.76
June	20.99		

> "These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, i. e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper" (R. 21).

There is no difference in value between Indian pepper and plaintiffs' pepper (Tr. 3-4).

There was a free market in India in that there was no ceiling and the Indians could trade with each other freely (Tr. 12, 21, 61-2). There was a depressed market, however, because the British Government had put restrictions upon the exportation of pepper from India (Tr. 12, 13, 61, 81). Otherwise, the price would not have been 21¢ and the price in South America $2.00.

India produces approximately 30,000,000 pounds per annum and the market price in such a country is certainly strong evidence of value.

SEVENTH POINT.

Cost, plus reasonable profit, justifies and requires an allowance in excess of 20 cents per pound.

In the very recent decision of this Court in *United States* v. *Cors*, 337 U. S. 325, this Court seems to view with favor the acceptance of cost as an important element in determining just compensation.

Respondents' cost, with some important overheads omitted, came to 14.49 cents per pound (Tr. 123-124).

The Court of Claims found the cost of plaintiff's pepper to be 12.7¢ (Fdg. 24, R. 21-22). But in making said finding the Court stated therein as follows:

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the perio dthat pepper was purchased and held. No interest is computed upon cost of any of the carrying charges, but only upon Commodities' original cost."

Moreover, the Court of Claims in said finding allowed for "bank interest, commissions, cables, exchange, etc.," only 2.75% pe rannum.

The interest allowed was not normal of which this Court can take judicial notice. The interest found by the Court was based on the interest actually paid by Commodities which at one time was only ⅛ of 1% per month (Tr. 175-180). But this was explained by a vice-president of the lending bank who showed that the bank had as collateral for its loans to Commodities, the guarantees of several persons of great wealth, stocks and bonds dealt in on the New York Stock Exchange for many hundreds of thousands of dollars and the pepper itself (Tr. 177-178). It was the safest possible kind of loan.

Moreover, the directors of Commodities kept balances with the bank of over $500,000. The bank was in effect loaning them their own money. And without risk. No wonder it was willing to do so at ⅛ of 1% at one time (Tr. 178-179).

Both figures, 14.49¢ per pound, and 12.7¢ per pound constituted costs which had been obtained only through gratuitous service sand advantages furnished by the four friends who owned the company.

The Court of Claims in the *Cors* case considered favorably the inclusion in cost of the value of services rendered gratuitously by an owner and this Court apparently approved.

The addition of the value of gratuitous services and proper overhead would bring the cost figure up to ap-

proximately 17½ cents. Then if a reasonable profit for holding and managing the pepper for 9 years is added, the total should not be less than 21¢ or 22¢. So also if the 12.7¢ figure found by the Court of Claims is built up by including interest at a reasonable rate and applying it to *all* of plaintiffs' expenditures in connection with storing and holding its pepper, the cost found by the Court of Claims would be brought up to 16½ to 17 cents per pound even without important overheads. And if a profit were added for carrying the pepper for nine years, the total would exceed 20¢.

CONCLUSION.

The Petition Should Be Denied.

New York, New York, September 23, 1949.

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